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U.S. Department of Justice

United States Attorney
Southern District of New York

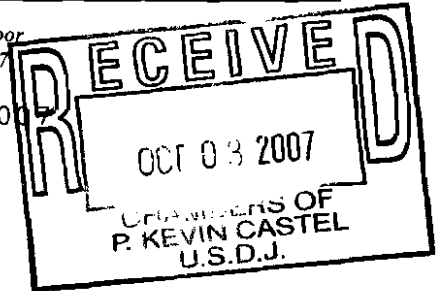
MEMO ENDORSED

BY HAND

The Honorable P. Kevin Castel
United States District Judge
United States Courthouse
500 Pearl Street, Room 2260
New York, New York 10007-1312

86 Chambers Street, 3rd Floor
New York, New York 10007

October 3, 2007



Re: Riverkeeper, et al. v. EPA, 06 Civ. 12987 (PKC)

Dear Judge Castel:

This Office represents defendant United States Environmental Protection Agency ("EPA"), in the above-referenced action in which the Court recently issued Orders dated September 21 and 28, 2007, denying EPA's motion to dismiss for lack of jurisdiction and sua sponte certifying the issue of the Court's subject matter jurisdiction over the Amended Complaint to the Second Circuit. We write respectfully to provide the Court with an update regarding the advanced status of the related proceedings in the Fifth Circuit, and to advise the Court that EPA intends to file a motion for a stay of litigation in this case pending the resolution of the Fifth Circuit proceedings. EPA intends to move for a stay of further litigation in this case because the related Fifth Circuit petitions for review referenced in the Court's Orders challenge the very same final agency action that is the subject of the Amended Complaint in this case. See ConocoPhillips, et al. v. EPA, 06-60662-ag (L). The jurisdictional question has been raised and is being briefed in that court. EPA's responsive brief regarding the Fifth Circuit's jurisdiction has already been submitted.

Pursuant to the Court's Individual Practices, we respectfully request a pre-motion conference regarding EPA's intended motion for a stay of this action. As the 10-day period for seeking an interlocutory appeal pursuant Federal Rule of Appellate Procedure 5 expires on October 12, 2007, we respectfully request that a conference be scheduled prior to that date.

I. Status of Proceedings in the Fifth Circuit and Grounds for Stay

As set forth in EPA's moving brief, on June 30, 2006, Riverkeeper and other parties involved in this action filed a petition for a review of the Phase III Rule in the Second

Pre-motion conference requested is granted. Defendant may file their stay motion. SO ORDERED. 10-3-07

Circuit, see Riverkeeper v. EPA, 06-3059-ag (2d Cir.). The petition was subsequently transferred to the Fifth Circuit under the random selection procedures set forth in 28 U.S.C. § 2112, and consolidated with other petitions challenging the Phase III Rule in the ConocoPhillips litigation.

There have since been developments in the Fifth Circuit litigation that were not raised in briefing submitted to this Court. Although the Court's September 28 Order, which sua sponte certified the issue of the Court's jurisdiction to the Second Circuit, seems to anticipate that the ConocoPhillips petitions will be transferred from the Fifth Circuit to the Second Circuit, that is not the case. By Order dated March 22, 2007, the Fifth Circuit denied Riverkeeper's motion to transfer the petitions to the Second Circuit. Riverkeeper's opening brief was filed in the Fifth Circuit on April 2, 2007, and EPA's responsive brief was filed on July 16, 2007. As of the date of this letter, the remaining submissions to be filed in that case include EPA's supplemental brief regarding the arguments of an amicus, and petitioners' reply brief, which will also respond to the arguments of the amicus. Briefing in the case will be completed by the end of November 2007. The issue of whether the Fifth Circuit has jurisdiction to review a challenge to the Phase III Rule pursuant to Section 509 of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(E), has been raised and is being briefed in the ConocoPhillips litigation. We regret not having brought these facts to the Court's attention prior to the issuance of the Court's Orders.

EPA agrees with this Court that its motion to dismiss for lack of jurisdiction raises pure questions of law that are "controlling" issues properly considered by a federal Court of Appeals pursuant to 28 U.S.C. § 1292(b), but respectfully submits that under the random selection procedures of 28 U.S.C. § 2112, the Fifth Circuit was the Court of Appeals chosen to decide these issues. Accordingly, EPA intends to move for a stay of this action until the Fifth Circuit has issued its decision in the ConocoPhillips case. Due to the fact that this case and ConocoPhillips involve the very same parties, as well as the same issues of law, a decision by the Fifth Circuit may be determinative of the claims before this Court.

It is well established that a district court has the inherent power to stay proceedings in order to wisely manage its docket, "with economy of time and effort for itself, for counsel, and for litigants." Landis v. North Am. Co., 299 U.S. 248, 254-55 (1936). "Although courts award stays in a wide variety of circumstances, they often do so when a higher court is close to settling an important issue of law bearing on the action." Wing

Shing Products Ltd. v. Simatelex Manufactory Co., 2005 WL 912184, at *2 (S.D.N.Y. Apr. 19, 2005) (internal quotation marks omitted); see also SST Global Technology, LLC v. Chapman, 270 F. Supp. 2d 444, 455 (S.D.N.Y. 2003) (noting propriety of stay in light of a "concurrently pending federal action" in the Federal Circuit where "the pending action would resolve a controlling point of law").

For these reasons, we respectfully request a pre-motion conference pursuant to the Court's Individual Practices. Counsel for the plaintiffs, Reed Super, Esq., has advised that his clients do not consent to EPA's intended motion for a stay of proceedings pending a decision in the Fifth Circuit. Counsel for intervenor CWIS Coalition has advised that his clients consent to EPA's request for a pre-motion conference, but respectfully request the opportunity to advise the Court of their position regarding a stay at the conference.

II. Necessity for Additional Time if a Stay is Not Granted

If the Court denies the requested stay of all proceedings, EPA will likely need additional time to consider whether to file an application to the Second Circuit for interlocutory appeal, and to seek any necessary approvals for such an application.¹ Accordingly, in that event, we will likely request that the Court withdraw its sua sponte certification without prejudice and permit EPA to request re-certification of the jurisdictional issue.

III. Relationship of This Action to Cronin v. Reilly, 93 Civ. 0314 (LTS)

Finally, we write respectfully in response to the reference in the Court's September 21 Order to Cronin v. Reilly, 93 Civ. 0314 (LTS), a related matter pending before Judge Swain. The Court's Order suggests that the parties submit further briefing explaining the relevance of Cronin to the claims in this action. In light of EPA's intent to seek a stay of this action pending a decision in the Fifth Circuit, we respectfully request leave of the Court to submit further briefing regarding Cronin at a later time.

We thank the Court for its consideration of these matters, and respectfully request that this submission be

¹ Under 28 C.F.R. § 0.20, prior approval of the Office of the Solicitor General is required to file any appeal in this matter and obtaining such an approval within the short timeframe provided for under Federal Rule of Appellate Procedure 5 would be extremely difficult.

docketed and included as a part of the record in this case.

Respectfully,

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